JD(ATL)–07–15
San Juan, PR

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SMG PUERTO RICO, II, LP

and	**CASES**	**12–CA–130436**
		12–CA–132098
UNITED HERE!, LA GASTRONOMICA,		**12–CA–132104**
LOCAL 610		**12–CA–132904**
		12–CA–132908

Maria Margarita Fernandez, Esq.,
for the General Counsel.[1]
Marcelle D. Martell-Jovet, Esq.,
for the Respondent.[2]
Manuel Rodriguez Banchs, Esq. and
Rosa Sequi, Esq., for the Charging Party.[3]

DECISION
STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. These cases were tried before me in San Juan, Puerto Rico, on February 4–5, 2015.[4] The charge in Case 12–CA–130436 was filed by the Union on June 11, and amended on September 30. The charges in Cases 12–CA–132098 and 12–CA–132104 were filed by the Union on July 2. The charges in Cases 12–CA–132904 and 12–CA–132908 were filed by the Union on July 16, and Case 12–CA–132908 was first amended on September 30, and a second time on October 30. The parties admit the accuracy of the filing dates for all charges and amendments. After an investigation of all charges and amendments, the Government, on October 31, issued an order consolidating cases, consolidated

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1 I shall refer to counsel for the General Counsel as counsel for the Government and to the General Counsel as the Government.

2 I shall refer to counsel for the Respondent as counsel for the Company and to the Respondent as the Company.

3 I shall refer to counsel for the Charging Party as counsel for the Union and to the Charging Party as the Union.

4 All dates are 2014 unless indicated otherwise.

complaint and notice of hearing.[5] At the beginning of the trial the Company and Union introduced a proposed settlement agreement (Jt. Exh. 1) resolving two of the charges.[6] The remaining complaint allegations are: on May 3 the Company suspended, and, on May 12 discharged, its employee, Osman Alvarez; on May 7 it discharged its employee Iris Mangual; and, on July 9 discharged its employee Veronica Mercado. It is alleged the Company exercised discretion in imposing the discharges described above and that the suspension and discharges relate to wages, hours, and other terms and conditions of employment of the stipulated bargaining units hereinafter described and are mandatory subjects for the purpose of collective bargaining. It is alleged, the Company engaged in this conduct without prior notice to the Union and without affording the Union an opportunity to bargain with the Company with respect to this conduct, and the effects of this conduct, and by its actions set forth above, has been failing and refusing to bargain collectively with the exclusive bargaining representatives of its employees in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

The Company in its answer to the complaint, and at trial, denies having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. In addition to the settlement agreement the parties entered into certain admissions and stipulation of facts. The Government called three and the Company called one witness. I have studied the whole record, the posttrial briefs, and the authorities cited. I conclude and find the Company violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION, LABOR ORGANIZATION STATUS AND SUPERVISORY/AGENCY STATUS

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[5] I shall to refer to the consolidated complaint simply as the complaint. The Company's argument that in the absence of a lawfully appointed Board quorum at the time Margaret Diaz was designated Regional Director for Region 12 of the Board that her appointment was invalid and she lacked authority to issue the complaint and/or to delegate the issuance of the complaint to Action Regional Director David Cohen is without merit. On July 18, 2014, a full complement of the five Board Members, as reflected in the "Minute of Board Action" of that date took certain actions including:

> Nevertheless, in an abundance of caution, with a full complement of five Board Members we now confirm, adopt and ratify *nunc pro tunc* all administrative, personnel and procurement matters approved by the Board or taken by or on behalf of the Board from January 4, 2012 to August 5, 2013, inclusive. This action is intended to remove any question that may arise concerning the validity of the administrative, personnel, and procurement matters undertaken during that period. In a further abundance of caution, and in an effort to bring an end to ongoing litigation regarding the actions of the Board and its personnel between January 4, 2012 and August 5, 2013, having considered the relevant supporting materials, the Board hereby expressly authorizes the following actions:
>
> 1. The selection of Dennis Walsh as Regional Director for Region 4 (Philadelphia);
> 2. The selection of Margaret Diaz as Regional Director for Region 12 (Tampa);

Also See: *Professional Transportation, Inc.* 362 NLRB No. 60 ft. at. 7 (2015).

[6] I approved on the record the proposed settlement agreement of the Company and Union addressing the independent 8(a)(1) allegations set forth in paragraph 7 (a)-(g), and, the information request allegations set forth in paragraph 10 (a)-(c). I severed from the complaint and remanded to the Regional Director for Region 12 of the Board Cases 12–CA–130436 and 12–CA–132104 for monitoring compliance with the terms of the approved settlement agreement and for all other matters related to those two cases.

The Company is a limited partnership that provides management, operations and maintenance services for the Puerto Rico Convention Center, a facility located in the Puerto Rico Convention District Authority, at 100 Convention Boulevard, San Juan, Puerto Rico. In conducting its operations the Company, during the 12 months prior to the issuance of the complaint herein, a representative period, purchased and directly received at its San Juan, Puerto Rico facility goods valued in excess of $50,000 from points outside the Commonwealth of Puerto Rico. The parties stipulate, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulate, and I find, the Union is a labor organization within the meaning of Section 2 (5) of the Act.

The parties stipulate that Company Director of Administration Jeanette "Gina" Montalvo, Director of Finance Jorge Perez, Operations Manager David Rodriguez, and General Manager Blarys Segarra are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

The Company and Union have for a period of time been in negotiations toward a collective-bargaining agreement for Company employees in the units set forth below.

The parties stipulated the following employees of the Company (Unit A) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All on-call Food and Beverage Attendants employed by the Employer at the Puerto Rico Convention Center, 100 Convention Blvd., San Juan, Puerto Rico Excluding all other employees, guards, professional employees and supervisors as defined by the Act.

On January 28, the Union was certified as the exclusive collective-bargaining representative of Unit A and at all times since that date, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of Unit A.

The parties stipulated the following employees of the Company (Unit B) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All regular full-time housekeeping, engineering/maintenance, and Set-up employees employed by the Employer at the Puerto Rico Convention Center, located at 100 Convention Blvd., San Juan, Puerto Rico, excluding all other employees, guards, professional employees and supervisors as defined by the Act.

On April 4, the Union was certified as the exclusive collective-bargaining representative of Unit B and at all times since that date, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of Unit B.

It is admitted, that at all times material here, the parties have not arrived at a grievance and arbitration procedure in their ongoing negotiations toward a collective-bargaining agreement.

It is stipulated the Company suspended its employee Osman Alvarez, with pay, on May 3 and discharged him on May 12. It is stipulated the Company exercised discretion in the discharge of Alvarez.

It is stipulated the Company discharged its employee Iris Mangual on May 7. It is also stipulated the Company exercised discretion in the discharge of employee Mangual and that it did not give notice to the Union nor did it afford the Union an opportunity to bargain prior to Mangual's discharge.

The Company denies it discharged its employee Veronica Mercado on July 9, but, rather contends it dropped her from its on-call list for failure to accept work.

Food and beverage department employee Mercado started working for the Company in 2004 and most recently was supervised by Banquet Supervisor Jennifer Ramirez. Mercado's work hours depended on the amount of available and scheduled work. Mercado and other food and beverage department employees were advised weekly usually on Tuesdays, by email of work opportunities and schedules by the Company. The Company posts work opportunities on its "When to Work" page and employees each are given an identification and password to access "When To Work." Food and beverage employees review the hours of work available and choose which hours they wish to work. Mercado testified she was available 20–30 hours per week in May 2014. According to Mercado, employees are allowed until noon on Wednesday to set their available work hours. After selecting their available for work hours employees are then notified on Wednesday evening or Thursday morning when they will actually work. Mercado testified the last time she was assigned work was on May 9, and she received that assignment from Food and Beverage Supervisor Ramirez.

Mercado testified she was attending mandatory training at the Company on July 16, and around 10 a.m. Supervisor Ramirez and Margarita Matos notified her to collect her belongings that she had to leave the class and would also be leaving the building. Mercado was escorted to Director of Administration Montalvo's office where Montalvo presented her a letter "which indicated that I no longer worked for SMG." Mercado testified Montalvo told her she "was not complying with the hours, I wasn't working with the hours, that what I was working 17 hours and because of that reason, I was discharged." The Company's July 9 letter to Mercado in pertinent part reads:

July 9, 2014

Veronica Mercado

475 Carr 8860 Apt. 2260
Cond. Patios Sevillanos
Trujillo Alto, PR 00976

Dear Veronica:

According to our records, your last day of work was on May 9, 2014. Since January of 2014 to the present, you have worked on 4 days, for a total of 17 hours. Even though there was work, the availability that you submitted conflicts with our operational needs and we have been unable to assign you shifts for more than 9 weeks.

For these reasons, we will proceed to terminate the employment that you held up to now for the Food and Beverages Department in the Puerto Rich Convention Center.

We appreciate the time that you worked with us and we wish you success in your future.

The Government provided, as an exhibit, a November 18, 2013 letter, to Food and Beverage Department employee Jose D. Muriel from Director of Administration Montalvo that reads in pertinent:

Dear Mr. [Jose D.] Muriel:

According to our records, your last day of work was August 8, 2013. More than three months have passed since you last worked with us. We contacted you in the month of October and you agreed to let us know of your availability, if any, in order to continue working with us. However, as of today you have not contacted us.

For these reasons, we will proceed to terminate the employment that you held until now in the Food and Beverage Department at the Puerto Rico Convention Center.

Mercado testified food and beverage department employees Melissa Correa and Harizael Pagan also had trouble completing their work hours but continued to be employed. Mercado explained; "Melissa Correa, she was like eight months out. And Harizael was like seven months."

On cross-examination Mercado acknowledged receiving, on September 5, 2012, a copy of the Company's August 17, 2012 policies regarding availability for and assignments of shifts. Mercado testified the employees were asked to sign their acknowledgements, "in a hurry without a copy." Further on cross-examination, Mercado testified:

Q. [By Ms. Martell-Jovst]

> The fact remains that between May of 2014 and the date of the letter [Mercado's letter of termination], which is July 9, 2014; you did not accept any shifts for work.
>
> A. [By Mercado] Because I have another work—another job and it didn't match up with the events that the convention center had.
>
> Q. So is that a yes that you did not accept any shifts?
>
> A. I couldn't work because my availability was not in accordance with the events.

Director of Administration Montalvo testified regarding work schedules as:

> Each week, the Company, according to the events that the Company shows, conventions, makes schedules and announce[s] it through a webpage called "When To Work"

Montalvo explained that "When To Work" was a web page showing the schedule of work from which the employees could select shifts they would be available for the following week that is, "the employee can enter the page and set their availability [for work] during the following week." Montalvo testified that "according to the policy, they [the employees] need to set at least 20 hours per week in a minimum of two days period, in operational hours of the convention or other events."

Director of Administration Montalvo testified, "If the employee does not accept shifts in a six-week period, its considered, normally, a voluntary resignation except if the employee in [is] licensed, approve—you know, approved by the Company." Montalvo explained a "licensed" exception would include situations where an employee is granted an approved "medical" or "military" based exception from accepting shift assignments. Montalvo testified employee Melissa Correa was not considered a voluntary resignation even though she did not work at all for a period of time because she was on a medical license approved by the Company. Montalvo testified Harizael Pagan was not considered a voluntary resignation for his absences from taking assignments because his assignments were cancelled by the Company.

The portion of the schedule assignment and attendance policy that Director of Administration Montalvo testified about, in part, states:

> **<u>Schedule Assignment and Attendance Policy</u>**
> SMG generally uses a scheduling assignment system called "When to Work" for "on-call" employees from the Food and Beverage Department.
>
> In order to achieve a fair scheduling assignment and to reinforce follow-up on the Attendance Policy, it is important for all personnel to comply with the following rules and measures:
>
> **Availability**

Every employee is responsible for updating their availability whether it be fixed or varied. Also, he or she may notify their availability by calling the Food and Beverage Department on Tuesday morning at 787-300-6842 or sending an e-mail to *pfigureoa@prconvention.com*.

Employees must submit an availability to work at least **20 hours a week** (excluding the period between 12am and on or after 7:30pm).

These 20 hours of availability must be distributed over a period of at least **two days a week.**

Every available day must be a minimum of **five hours** (Banquets) and eight hours (Kitchen and Concessions).

An employee must make a request to the manager up to four weeks a year in order to close out their full availability (consecutive or split), requesting it at least two weeks prior to the desired date.

Due a lack of availability, if an employee is not assigned available work shifts, either for him or her, for a minimum 6-week consecutive period, it shall be considered a voluntary resignation; even when they have complied with the minimal limits of availability.

Shift assignments

The schedule shall generally be posted on Wednesday mornings. From that time on, the employee is responsible for reviewing and confirming it.

If the employee does not confirm on or before Wednesday at 3pm, he or she shall be considered unavailable and their shift shall be reassigned.

In the event of a last-minute increase in guarantees, these shifts shall be assigned to available personnel at the time they are contacted.

Union Official Barbes testified she only learned that Mercado was no longer employed by the Company after Mercado's employment had ended. Barbes said she had no occasion to meet with the Company to discuss its actions related to Mercado prior to her employment ending.

Housekeeping Team Leader Alvarez commenced working for the Company in October 2005 and continued until he was suspended, on or about, May 3 and discharged on May 12. Alvarez' job duties included being in charge of housekeeping, recycling, setup, and, keeping the building clean including public areas, exhibit halls, and big rooms. As a long-term employee, Alvarez taught young coworkers the various aspects of their jobs. Alvarez worked 6 a.m. to 3 p.m., 40 hours per week, but on no established or set workdays.

Alvarez testified that at the end of his shift on Friday, May 2, Operations Manager David Rodriguez asked him to call the employees together because he had something to tell them, that he did not like, from a visit by someone in a high position at corporate level. Alvarez said he was not feeling well that day, and had in fact, just returned from the emergency room at a local hospital. Alvarez told Operations Manager Rodriguez he was not feeling well and gave him some "medical papers."

Around 8:30 p.m. the next day, Saturday, May 3, Alvarez received a telephone call from Operations Manager Rodriguez who told him he also had Security Supervisor Jacinto de Leon on a speaker telephone for the call. Alvarez testified Rodriguez told him he had talked to human resources and informed Alvarez he was "suspended under investigation." Alvarez said that since he had that day, Saturday and Sunday off work; he asked if they were going to provide him any documentation regarding his suspension. Alvarez was told they would contact him. Alvarez remained suspended for 1 week.

At the end of that week Operations Manager Rodriguez requested Alvarez come to the human resources department the following Wednesday. Alvarez contacted Union President Jason Rodriquez and Union Official Angela Barbes about going with him to the meeting. The two told Alvarez to go without them and "give my explanation of what had happened." The union representatives were unable to go with Alvarez because they were in negotiations that day. Alvarez met with Director of Administration Montalvo and Operations Manager Rodriguez. Alvarez gave his explanation. Montalvo wrote it down and told him they would continue the investigation and thereafter contact him. Alvarez was requested to again meet with the Company on May 12. This time the two union representatives he requested accompanied him to the meeting. Director of Administration Montalvo and Director of Finance Perez were present for the Company. Alvarez testified Montalvo told him they had already taken a decision to terminate him. Union Official Barbes asked why Alvarez was being terminated. Montalvo said it was for abandoning a meeting. The meeting ended. Union Official Barbes testified the Company never notified the Union of its intention to suspend or terminate Alvarez prior to his being terminated.

B. The discharge of employees Alvarez, Mangual and Mercado

As noted earlier, it is alleged that on May 3, the Company suspended, and, on May 12 discharged its employee Alvarez; that on May 7, it discharged its employee Mangual; and, that on July 9 discharged its employee Mercado and exercised discretion in imposing the discharges. It is alleged the suspension and discharges relate to wages, hours, and other terms and conditions of employment of employees in Unit A and Unit B and are mandatory subjects for the purpose of collective bargaining. It is also alleged the Company took the above actions without prior notice to the Union and without affording the Union an opportunity to bargain with the Company with respect to its actions, and the effects of its actions, and in doing so, has been failing and refusing to bargaining collectively with the exclusive bargaining representatives of its employees in violation of Section 8(a)(5) and (1) of the Act.

Before addressing whether an employer has a preimposition duty to bargain involving the imposition of discretionary discipline where the employees are represented by a

union, but, at a time when the parties have not arrived at a first contract or an interim grievance procedure, it is helpful to determine if the preliminary requirements were actually established such as; was the discipline discretionary; did it involve mandatory subjects for bargaining; was there a collective-bargaining agreement or interim grievance procedure agreed to; was notice and an opportunity to bargain provided; and, did the discipline involve unit employees.

It is undisputed the three employees at issue here were employees either of bargaining Unit A or Unit B and that the Union is the certified exclusive collective-bargaining representative for the Unit A and Unit B employees.

It is admitted that, at all times material here, the parties have not arrived at a collective-bargaining agreement, nor, have they agreed upon an interim grievance and arbitration procedure.

It is stipulated the Company discharged its employee Mangual on May 7, and, that it exercised discretion in doing so, and, that it did not give notice to, nor, did it afford the Union an opportunity to bargain prior to Mangual's discharge.

It is stipulated the Company suspended Alvarez on May 3 and discharge him on May 12 and the Company exercised discretion in discharging Alvarez.

I now address whether any notice was given to the Union and whether the Company provided the Union an opportunity to bargain prior to Alvarez' suspension and discharge. The evidence is clear, Alvarez was informed on Saturday May 3, he was being suspended from work starting that day so the Company could conduct an investigation of Alvarez's actions on Friday, May 2. It appears Alvarez was not feeling well on Friday afternoon and may not have attended a Company meeting that evening. Alvarez contacted Union President Rodriguez and Union Official Barbes for them to go with him to the first meeting with the Company so he could give his explanation of what had happened on May 2, but, the two union officials were unavailable to do so but encouraged Alvarez to go to the meeting without them and tell his side of the events. There is no credible evidence anyone from the Company notified the Union about this meeting nor any evidence the Company was ready and willing to bargain, at this point, with the Union concerning Alvarez. Alvarez was requested to meet with the Company again on May 12. Alvarez again requested the union representatives accompany him and this time they did. Director of Administration Montalvo announced to Alvarez the Company had already taken a decision to terminate his employment. Union President Rodriguez and Union Official Barbes were present at that meeting at the request of Alvarez and not by notification of the Company, and, clearly not for any bargaining with the Union regarding Alvarez's termination because the Company simply announced that decision had already been taken.

More specifically, Union Official Barbes credibly testified the Company never notified the Union of its intention to suspend or terminate Alvarez prior to his termination.

I specifically find the Company did not give notice to the Union, nor did it afford the Union an opportunity to bargain prior to Alvarez' suspension and/or termination.

It is clear Mercado was asked to leave a mandatory training class at the Company on July 16 and taken to the human resources department where she was informed by Director of Administration Montalvo she had been terminated on July 9, for failing to make herself available for work on dates that met the Company's operational needs. Mercado acknowledged she was unable to accept any shifts for work between May and July 9 because she "couldn't work because my availability was not in accordance with the events." Mercado explained she had another job where she worked.

Mercado testified other employees, namely, Melissa Correa and Harizael Pagan had trouble meeting/completing their work hour requirements but were allowed to continue their employment rather than being terminated.

Director of Administration Montalvo explained that employee Correa's absence was approved by the Company for medical considerations, and, Pagan's not taking assignments were excused by the Company because his assignments were cancelled by the Company.

The evidence demonstrates that after employee Jose D. Muriel missed more than 3 months of assignments, the Company, did not immediately terminate him, but, rather sought him out seeking his agreement to let the Company know of his availability to accept work assignments.

I am persuaded the above demonstrates the Company had, and on occasion exercised, discretion related to its employees accepting assignments. The Company expressly did so with respect to employee Muriel. Also the Company made decisions whether to accept an employee's absence for medical or cancelled work reasons.

It is clear the Company did not give notice to nor provide an offer to the Union to bargain concerning Mercado's employment with the Company. Union Official Barbes credibly testified she only learned of Mercado's termination after Mercado no longer worked for the Company. Stated differently, Barbes had no occasion to meet with the Company to discuss its actions related to Mercado prior to Mercado's employment ending.

It is beyond question that employees' continued employment or termination constitutes one of many, perhaps the most important, fundamental terms and/or conditions of employment, and as such are mandatory subjects of bargaining.

The Government contended at trial and in its posttrial brief that the Board's rational in *Alan Ritchey, Inc.,* 359 NLRB No. 40 (2012), "was soundly reasoned and its rational and reasoning should be adopted here." The Government further contends it is clear all prerequisites have been met for triggering the Company's obligation to bargain before imposing discretionary discipline as outlined in the *Alan Ritchey* rationale.

The Company contends the Board's decision in *Alan Ritchey* is null and void *ab initio* pursuant to the Supreme Court's holdings in *New Process Steel, L.P. v. NLRB,* 560 U.S. 674 (2010), and *Noel Canning* 134 S.Ct. 2550 (2014). The Company contends this case is controlled by the Board's decision in *Fresno Bee*, 337 NLRB 1161 (2002), where the legality of an

employer's existing, long-established disciplinary policies and procedures is not in question and have remained unaltered after a union election certification, an employer has no preimposition duty to bargain over discretionary discipline. The Company contends that until a constitutionally appointed and impaneled Board "proclaims, in no uncertain terms, that it will either adopt or reject the *Ritchey* rational", the Board's judges should exercise restraint and not heed the Government's urging to adopt the *Alan Ritchey* rational, but, rather should apply the longstanding and clearly valid holdings of *Fresno Bee*, supra), that an employer has no preimposition duty to bargain over discretionary discipline.

Alan Ritchey has no precedential value because the Board's decision in that case became invalid due to constitutional considerations in *Noel Canning*, 134 S.Ct. 2550 (2014). In fact, the *Alan Ritchey* case has, since *Noel Canning* issued, been closed by the Board. Although *Alan Ritchey* has no precedential value, I, nonetheless, adopt the Board's *Alan Ritchey* rationale, as I find it independently persuasive.

In adopting the Board's *Alan Ritchey* rational it is helpful to review just what the Board concluded in its now null and void decision. In *Alan Ritchey* the Board addressed, in its broader doctrinal context, under Section 8(a)(5) of the Act, whether an employer whose employees are represented by a union must bargain with the union prior to imposing discretionary discipline on a unit employee. The Board noted that this particular question usually arises only during the period after the union has become the employees' bargaining representative, but before the parties have arrived at an initial collective-bargaining agreement, and, only if the parties have not agreed upon an interim grievance procedure. The Board held, under this limited application, that, like other terms and conditions of employment, discretionary discipline is a mandatory subject of bargaining and employers may not impose discretionary discipline unilaterally. It is the Board's rationale that I adopt here and explain as follows.

The Board in *Alan Ritchey* noted it had held in a variety of other contexts that once employees choose to be represented, an employer may not continue to act unilaterally with respect to terms and conditions of employment, even where it has previously done so routinely or at regularly scheduled intervals. The Board further notes, the Supreme Court in *NLRB v. Katz*, 369 U.S. 736 (1962),approved its determination that an employer violates Section 8(a)(5) of the Act by making unilateral changes to represented employees' terms and conditions of employment. Such a unilateral change is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) just as a flat refusal to bargain does. The Board, citing *Oneita Knitting Mills,* 205 NLRB 500 (1973), pointed out that if an employer has exercised and continues to exercise discretion in regard to a unilateral change, such as the amount of an annual wage increase, it must first bargain with the union over the discretionary aspect. The Board's *Alan Ritchey* rationale, relying on *Toledo Blade Co.,* 343 NLRB 385, 387 (2004), does not require notice and bargaining before every unilateral change but rather those changes that have a material, substantial, and significant impact on employees' terms and conditions of employment such as termination. The Board opined that requiring notice and bargaining before imposing discretionary discipline is appropriate because of the immediate impact on the employees and because of the harm caused to the union's effectiveness as the employees' representative if bargaining is postponed. The Board in *Alan Ritchey* went on to explain it has long recognized that an employer's obligation to maintain the status quo sometimes entails an obligation to make

changes in terms and conditions of employment, even when those changes are an established part of the status quo. The Board in *Oneita Knitting Mills,* 205 NLRB 500 (1973), held an employer violated Section 8(a)(5) by unilaterally granting merit wage increases to represented employees, even though it had a past practice of granting such increases. The Board in *Oneita Knitting Mills* explained:

> An employer with a past history of a merit increase program neither may discontinue that program (as we found in *Southeastern Michigan* [supra]) nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. *N.L.R.B. v. Katz*, 369 U.S. 736 (1962). What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted Id. at 500.

The Board in explaining its *Alan Ritchey* rationale noted *NLRB v. Katz* 369, U.S. at 746 involved an employer's grant of merit increases that were "in no sense automatic, but were informed by a large measure of discretion." The Board also noted in its *Alan Ritchey* rationale that in the decades since *NLRB v. Katz* and *Oneita Knitting Mills,* where considering various terms and conditions of employment, it had applied the principle that even regular and recurring changes by an employer constitute unilateral actions where an employer maintains discretion in relation to the nature and/or extent of the changes.

The Board in its *Alan Ritchey* rationale noted that in *Washoe Medical Center, Inc.,* 337 NLRB 202 (2001), an employer's "substantial degree of discretion" in placing newly hired employees into one of four wage ranges based on subjective judgments, required the employer to bargain with the union prior to implementing the wage rates. Further noting it held in *Eugene Iovine,* 328 NLRB 294 (1999), an employer's recurring unilateral reductions in employees' hours of work were discretionary and therefore required prior bargaining because there was no reasonable certainty as to the timing and/or criteria for the reduction in employee hours but rather the employer's discretion to decide whether and when to reduce employee hours appeared unlimited. The Board noted that in *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. (1990), it required an employer to bargain regarding economically motivated layoffs, when the owner selected the employees to be laid off based, not on seniority, but on his own judgment of the employees abilities.

Under this large umbrella of cases (and others) the Board articulated its rationale for concluding that an employer whose employees are represented by a union, and at a time when the parties have not arrived at a first contract or an interim grievance procedure, must bargain with the union before imposing discretionary discipline (a mandatory subject of bargaining) on unit employees.

I find the case here falls under the Board's articulated *Alan Ritchey* rationale. In that regard I note it is stipulated the Company terminated Unit A and/or B employees Alvarez and Mangual on May 12 and 7, respectively, and that the discharges were within the Company's

discretion. It is stipulated the Company did not give notice to, nor, did it afford the Union an opportunity to bargain prior to Mangual's discharge. As fully discussed elsewhere here, the Company did not give notice to, nor, did it afford the Union an opportunity to bargain prior to Alvarez' termination. As explained elsewhere here, the record clearly establishes the Company discharged Unit A employee Mercado on July 9, and did so without notice to and did not afford the Union an opportunity to bargain prior to Mercado's discharge. The discharges are mandatory subjects of bargaining and it is stipulated there was no collective-bargaining agreement in effect and no grievance procedure established at the time of the discharges.

I adopt the Board's *Alan Ritchey* rationale and conclude the Company had an obligation to provide notice to and an opportunity to bargain with the Union prior to imposing the discretionary discipline (discharge) of the three unit employees, and as such, the Company violated Section 8(a)(5) and (1) of the Act, and I so find.

I address the Company's contention that since the Board's *Alan Ritchey* decision is a nullity that *Fresno Bee*, 337 NLRB 1161 (2002), constitutes current Board law on the preimposition duty to bargain over discretionary discipline. In *Fresno Bee* the Board adopted an administrative law judge's finding an employer has no preimposition duty to bargain over discretionary discipline. The Board in discussing its rationale in *Alan Ritchey*, for rejecting *Fresno Bee,* which rationale I adopt here, pointed out that government counsel in *Fresno Bee*, drawing on the principles and precedent the Board considered in *Alan Ritchey*, argued the employer in *Fresno Bee* exercised considerable discretion in disciplining its employees and thus had to bargain to impasse with the union over all imposition of discipline. The Board, in *Alan Ritchey,* noted the judge in *Fresno Bee* rejected that argument, but, her rationale for doing so, misunderstood Board case law and failed to explain why discipline should be treated as fundamentally different from other employer unilateral changes in terms and conditions of employment. In *Alan Ritchey* the Board noted regarding the judge's rationale in *Fresno Bee*:

> As her decision reveals, the judge's error was to conclude that because the employer had not changed its disciplinary system, the imposition of discipline with respect to individual employees, even if it involved the exercise of discretion, did not amount to a unilateral change.

The Board's rationale in *Alan Ritchey* for arriving at its conclusion the trial judge in *Fresno Bee* was wrong, noted the trial judge accepted the fact that the discipline administered to employees in *Fresno Bee* was, in part, discretionary and noted the judge in *Fresno Bee:*

> Nevertheless, . . . reasoned that the fact the procedures reserve to [the employer] a degree of discretion or that every conceivable disciplinary event is not specified, does not vitiate the system as a past practice and policy." Id. The General Counsel had not contended that the employer's "discipline policies were unilaterally altered," and "[t]here was no evidence that [the employer] did not apply its preexisting employment rules or disciplinary system in determining discipline." Id. *"Therefore,"* the judge concluded, the employer "made no unilateral change in terms and conditions of employment when it applied discipline." Id. at 1186–1187 (emphasis added).

> Under our case law, the judge's conclusion was a non sequitur. As we have explained, the lesson of well-established Board precedent is that the employer has both a duty to maintain an existing policy governing terms and conditions of employment and a duty to bargain over discretionary applications of that policy. It was no answer to the General Counsel's argument in *Fresno Bee*, then to say that because the employer's disciplinary policy had stayed the same, the employer had no duty to bargain over discretionary disciplinary decisions. Nor did it suffice to point out that the employer had bargained over the discipline *after* it was imposed: the General Counsel was arguing for a *preimposition* duty to bargain. Id. at 1187

The Board went on to observe in its rationale in *Alan Ritchey* the demonstrably incorrect conclusion the trial judge in *Fresno Bee* had arrived at by:

> As observed, the *Fresno Bee* Board simply adopted the judge's rationale. But that rationale–the only rationale articulated–was demonstrably incorrect. In such circumstances, we decline to follow *Fresno Bee.* See *Goya Foods of Florida*, 356 NLRB No. 184, slip op. at 3 (2011) ("We are not prepared mechanically to follow a precedent that itself ignored prior decisions, without explanation."). To the extent *Fresno Bee* contradicts our conclusion here, it is overruled. [Footnote omitted.]

Here, I reject the Company's contention *Fresno Bee* is controlling and rather adopt the Board's *Alan Ritchey* rationale that an employer has a preimposition obligation to bargain over discretionary discipline at a time when the parties have not arrived at a first contract or an interim grievance procedure and the concerns involve mandatory subjects of bargaining. I also reject the Company's contention the Union somehow waived its right to notification and bargaining as the record is void of any evidence of waiver on the Union's part.

CONCLUSIONS OF LAW

1. The Company, SGM Puerto Rico II, LP, San Juan, Puerto Rico, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, UNITE HERE la Gastronomica, Local 610, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, UNITE HERE la Gastronomica, Local 610, has been, and continues to be, the exclusive bargaining representative for the purposes of collective bargaining within the meaning of Section 9(a) of the Act the employees employed by SGM Puerto Rico II, LP in the following units:

Unit A

All on-call Food and Beverage Attendants employed by the Employer at the Puerto Rico Convention Center, 100 Convention Blvd., San Juan, Puerto Rico

Excluding all other employees, guards, professional employees and supervisors as defined by the Act.

Unit B

All regular full-time housekeeping, engineering/maintenance, and set-up employees employed by the Employer at the Puerto Rico Convention Center, located at 100 Convention Blvd., San Juan, Puerto Rico, excluding all other employees, guards, professional employees and supervisors as defined by the Act.

4. By failing to provide UNITE HERE la Gastronomica, Local 610 with notice or an opportunity to bargain concerning the discharge of unit employees Osman Alvarez, Iris Mangual, and Veronica Mercado, which terminations were within the discretion of the Company, and at a time when the parties had not arrived at a first contract or an interim grievance procedure, and which terminations were mandatory subjects of bargaining the Company has violated Section 8(a)(5) and(1) of the Act.

5. The unfair labor practices of the Company affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I specifically recommend the Company be ordered to bargain with the Union regarding the discharge of Unit A and/or B employees Osman Alvarez, Iris Mangual, and Veronica Mercado. I decline the Government's request to recommend any additional remedies (such as reinstatement and/or backpay) as the Board, in its null and void *Alan Ritchey, Inc.,* 359 NLRB No. 40 (2012) decision, applied its holdings prospectively. Additionally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I hereby issue the following recommended[7]

ORDER

The Company, SMG Puerto Rico, II, LP, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing to bargain with UNITE HERE la Gastronomica, Local 610 concerning the discharge of unit employees Osman Alvarez, Iris Mangual, and Veronica Mercado.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Bargain with UNITE HERE la Gastronomica, Local 610 concerning the discharge of Unit employees Osman Alvarez, Iris Mangual, and Veronica Mercado.

(b) Within 14 days after service by the Region, post at its facility at Puerto Rico Convention Center, located at 100 Convention Blvd., San Juan, Puerto Rico, copies of the notice marked "Appendix"[8] copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as email, posting on the intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facilities involved here, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since May 3, 2014.

(c) Notify the Regional Director of Region 12 in writing within 20 days from the date of this Order what steps the Company has taken to comply.

Dated Washington, D.C. April 17, 2015

William N. Cates
Administrative Law Judge

[8] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union;
Choose a representative to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with UNITE HERE la Gastronomica, Local 610 concerning the discharge of Unit A and/or B employees Osman Alvarez, Iris Mangual, and Veronica Mercado.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL bargain in good faith with UNITE HERE la Gastronomica, Local 610 concerning the discharge of Unit A and/or B employees Osman Alvarez, Iris Mangual, and Veronica Mercado.

SMG PUERTO RICO, II, LP
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: ww.nlrb.gov.

La Torre de Plaza, Suite 1002, 525 F. D. Roosevelt Avenue, San Juan, PR 00918-1002
(787) 766-5347 Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-130436 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (787) 766-5377.